

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GARY CALHOUN,	)	
	)	Petitioner,
	)	
vs.	)	Civil Action No. 14-189J
	)	Judge Kim R. Gibson/
STEVEN R. GLINT; ATTORNEY	)	Chief Magistrate Judge Maureen P. Kelly
GENERAL OF THE STATE OF	)	
PENNSYLVANIA; DISTRICT	)	
ATTORNEY OF THE COUNTY OF	)	
CAMBRIA,	)	Re: ECF No. 6
	)	
	)	Respondents. )

**MEMORANDUM ORDER**

The above-captioned pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (the “Petition”) was received by the Clerk of Court on September 2, 2014 and was referred to Chief Magistrate Judge Maureen P. Kelly for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

The Respondents filed a Motion to Dismiss the Petition, ECF No. 6, noting that Petitioner had a presently pending direct appeal in the Pennsylvania Superior Court and so, his state court remedies had not been exhausted. Chief Magistrate Judge Kelly, in the Report and Recommendation, ECF No. 8, filed on October 8, 2014, recommended that the Motion to Dismiss be granted and that the Petition be dismissed due to Petitioner’s failure to exhaust. Petitioner was informed that, in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and the local rules, he had until October 27, 2014 to file objections. On October 14, 2014, Petitioner filed a Brief in Support of his Petition, ECF No. 10, as well as

something captioned “Records Submission,” ECF No. 11, neither of which was responsive to the Report. On October 23, 2014, Petitioner filed Objections. ECF No. 12.

Nothing in those Objections merits rejection of the Report. Petitioner does not deny that he has a presently pending direct appeal in the Pennsylvania Superior Court. Hence, he has not exhausted his state court remedies as the Report concludes. Petitioner does mention that he has also making a claim under Section 1983 by means of the Petition. ECF No. 12 at 1. However, he is not permitted to pursue both habeas claims and civil rights claims in a single civil action. See, e.g., Burnam v. Marberry, 313 F. App’x 455, 456 n.2 (3d Cir. 2009) (where a prisoner filed an action seeking relief under the Privacy Act and under the Administrative Procedures Act but also repeatedly mentioned 28 U.S.C. § 2241 throughout the filing, and the District Court construed the filing as a Section 2241 petition but also entertained the non-habeas APA claims, the Court of Appeals criticized the District Court for doing so and declared that the District Court “should not have combined the habeas action and the claims under the Privacy Act and APA into a single case. A better approach would have been to dismiss the habeas petition without prejudice and to focus on the alleged statutory violations, or in the alternative to have still construed the action as one of habeas corpus but to restrict its scope to challenges to the fact or duration of Burnam’s confinement, or the execution of his sentence.”); Forrest v. Sauers, No. 3:CV-13-0067, 2013 WL 3097569, at \*2 (M.D. Pa. June 8, 2013) (“Mr. Forrest has presented a hybrid action sounding in both civil rights and habeas. He cannot do so in a singular habeas action as his conditions of confinement claims seek monetary damages and do not call into question his sentence or conviction. As such, they do not sound in habeas and must be pursued in a § 1983 action.”).

Accordingly, after de novo review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 6<sup>th</sup> day of November 2014,

IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED and the Petition is dismissed without prejudice for failure to exhaust.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 8 filed on October 8, 2014, by Chief Magistrate Judge Kelly, is adopted as the opinion of the Court.

A Certificate of Appealability is denied.

Date: November 6, 2014



KIM R. GIBSON  
UNITED STATES DISTRICT JUDGE

cc: The Honorable Maureen P. Kelly  
Chief United States Magistrate Judge

All counsel of record via CM-ECF

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